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Letter Ruling 08-4: Application of Sales Tax to Sales of Beverages by Health Club Facilities

March 13, 2008

You request a letter ruling on behalf of ***** “Corporation” regarding the applicability of the Massachusetts sales tax, G.L. c. 64H, to sales of beverages sold from coolers located in two of Corporation’s Massachusetts health club facilities: ***** and ***** . You request a ruling that the sales of the beverages at issue are exempt from the Massachusetts sales tax.

Facts

You describe the facts as follows. Corporation operates health club facilities where members can workout, exercise, and stay fit. Each facility operated by Corporation, including the two at issue, is approximately 30,000 square feet and consists of a wide assortment of fitness equipment for weight, circuit, cardiovascular fitness, and aerobics training. Amenities include cardiovascular, circuit, and aerobics training areas, free weights, and a beginner area in addition to locker rooms, daycare, tanning, and a membership counter. At the membership counter of each health club facility, including the two at issue, Corporation sells beverages in unopened original containers from three upright refrigerated coolers with glass fronts. Available from these coolers are water and sports drinks. The flavors and brands of the beverages sold change monthly depending on vendor specials and availability. Also available for sale at the membership counter of each health club facility are a limited supply of prepackaged energy snack bars. These snack bars are not at issue. No health club facility provides an “eat in” area (e.g., tables, chairs) for use by members who purchase the beverages at issue.

Discussion

Massachusetts imposes a five percent sales tax on retail sales of meals by a restaurant. G.L. c. 64H, §§2 and 6; 830 CMR 64H.6.5(1). The tax is levied on the sales price of the meal. Sales of food products for human consumption are exempt from sales tax, however. G.L. c. 64H, § 6(h). “Food products” include water and drinks such as soft and fruit drinks, but does not include meals sold by restaurants. *Id.*

A “meal,” as that term is defined under the Massachusetts General Laws (“General Laws”) for purposes of the sales tax, includes beverages, if provided by a restaurant. A “meal” is broadly defined as “any food or beverage, or both, prepared for human consumption and provided by a

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restaurant, where the food or beverages is [*sic*] intended for consumption on or off the restaurant premises, and includes food or beverages sold on a 'take out' or 'to go' basis, whether or not they are packaged or wrapped and whether or not they are taken from the premises of the restaurant." *Id.*

A "restaurant," as that term is defined under the General Laws includes "any eating establishment where food, food products, or beverages are provided and for which a charge is made, including but not limited to, a cafe, lunch counter, private or social club, cocktail lounge, hotel dining room, catering business, tavern, diner, snack bar, dining room, vending machine, and any other place or establishment where food or beverages are provided, whether stationary or mobile, temporary or permanent. . . ." *Id.* The term "restaurant" does not include a delicatessen, grocery, market, or bakery store, however, "except for any part of such a store which engages, in the sale of dinners, luncheons, . . . sandwiches, snacks, pizzas, and other similar items which are commonly sold at snack bars, coffee shops or luncheon counters." *Id.*

The *Sales Tax on Meals* Regulation ("Regulation"), 830 CMR 64H.6.5, defines "store" more broadly than do the General Laws as "any establishment that is not primarily engaged in the business of selling meals. 830 CMR 64H.6.5(5)(c). A "restaurant part" is defined in the Regulation as "an area, section, or counter, etc., within a store from which meals are sold. Examples of establishments that may be stores with a 'restaurant part' [under the Regulation] include but are not limited to: bakeries, delicatessens, grocery stores, markets, or supermarkets." *Id.* Under the Regulation, "[a]n establishment may use the term store, bakery, delicatessen, convenience store, market, [video store], etc. in its name, but if it is primarily engaged in the business of selling meals it is a restaurant for purposes of the sales tax." 830 CMR 64H.6.5(6).

A "meal" is defined in the Regulation as "any food or beverage, or both, served or presented by a restaurant or restaurant part in a manner that is reasonably and commonly considered a meal. A meal includes food or beverages sold on a 'take out' or 'to go' basis, whether or not they are packaged or wrapped, and whether or not they are taken from the premises." 830 CMR 64H.6.5(5)(d). Items that are commonly considered "meals" under the Regulation include poured beverages; heated prepared foods such as lasagna, eggplant parmesan, or quiche; heated meals, such as hot dogs, hamburgers, pizza, or soup; sandwiches whether or not prepackaged and whether or not heated; and unpackaged snacks including, for example, unpackaged baked goods in units of less than six or fresh popped popcorn. See 830 CMR 64H.6.5(6)(b)2. The sale by a store or establishment, such as the health club facilities at issue, of beverages sold in unopened original containers and prepackaged energy snack bars however, would not "commonly be considered a meal," under the Regulation. Thus, the health club facilities at issue are not stores with restaurant parts.

Under the Regulation, if a store or establishment is not a restaurant or does not have a restaurant part, that is, it is not primarily engaged in the business of selling meals, then beverages sold by it in unopened, original containers for off-premises consumption are not subject to sales tax, whether purchased separately or in combination with other foods. 830 CMR 64H.6.5(6)(a)7 and (b). Indicia that a food item is sold for off-premises consumption include the unavailability of in-store seating, e.g., tables and chairs. Corporation's two health club facilities provide no tables and chairs to sit at for drinking the beverages at issue.

Conclusion

Corporation's health club facilities at issue are not selling meals and are not restaurants or stores with restaurant parts. Accordingly, the sales of the beverages at issue are exempt from the Massachusetts sales tax.

Very truly yours,

/s/Navjeet K. Bal

Navjeet K. Bal
Commissioner of Revenue

NKB:MTF:pls

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